SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1421 103

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE E. NELSON,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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INDEX

CITATIONS

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled causes.

Opinion Below

The opinion of the Court of Claims was entered on December 2, 1946, and is reported in 68 F. Supp. 966.

Jurisdiction

The judgment of the Court of Claims was entered on December 2, 1946. Plaintiffs' motion for a new trial was overruled by the Court of Claims on March 3, 1947, and this petition was filed in less than three months after said date. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement

These cases involve actions by government employees for overtime compensation at one and one-half times the regular rate because of overtime employment. The petitioners believe that the decision of the Court below is in conflict with the judicial pronouncements of this Honorable Court in *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134, both decided December 4, 1944, dealing with the overtime pay of fire fighters.

There is in issue here the interpretation and application of the Federal Overtime Pay Acts covering government employees generally, with certain exceptions and limitations. These Statutes have not heretofore been construed by this Court in any proceeding, and the questions at issue here are important in the administration of such laws.

The petitioners were civilian employees of the United States Government, under Civil Service, with salaries fixed on an annual basis, employed as civilian fire fighters by the War Department at the United States Army Air Base at Gulfport, Mississippi.

The petitioner, Albert F. Conn, began work as such on September 24, 1942; the petitioner, Robert D. Flynt, on February 17, 1944; and the petitioner, Willie E. Nelson, on July 17, 1943, and they were so employed continuously through June 30, 1945.

During the periods material herein, the petitioners worked under a regular scheduled tour, fixed by the War Department, of 24 consecutive hours on duty followed by 24 consecutive hours off duty, averaging 84 hours of duty per week.

The petitioners seek to recover overtime pay at time and one-half the regular rate on the basis of 84 hours of employment per administrative workweek, or 44 hours of overtime in excess of 40 hours per week, or in the alternative, such overtime pay as is right and proper under the applicable Acts and the facts and circumstances of these cases.

The decision of the Court of Claims, however, denies them overtime compensation at time and one-half for the periods prior to January 1, 1945 upon the erroneous theory that their hours of employment prior to that date were "intermittent or irregular." This decision premised as it is upon the Court's conclusion that a regularly scheduled workweek becomes "intermittent" or "irregular" employment when it includes certain hours of standby duty, is all the more patently erroneous when it is considered that the Civil Service Commission and the War Department (the agencies charged with administration in the present cases) both repudiated this interpretation nearly two and one-half years ago and have since that time adopted and applied a view basically identical with that of the petitioners.

The governing statutes providing for the payment of overtime compensation at one and one-half times the regular rate for employment in excess of 40 hours per administrative workweek are Senate Joint Resolution No. 170, 77th Congress, approved December 22, 1942 (Public Law No. 821, 56 Stat. 1068), which was in effect during the period from December 1, 1942 to April 30, 1943, inclusive, and the War Overtime Pay Act of 1943, approved May 7, 1943 (57 Stat. 75), which was in effect during the period from May 1,

1943 to June 30, 1945, inclusive, which Acts are set forth in the Appendix hereto.

The petitioner, Albert F. Conn., was only paid an amount equal to 10 per centum of his basic compensation in lieu of overtime pay at time and one-half the regular rate for the period December 1, 1942 to June 30, 1943, during which period he was regularly on duty 24 hours each alternate day (Finding 23(a)).

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, were only paid $300.00 per annum, or 15 per centum of their basic compensation, whichever was higher, in lieu of overtime pay at time and one-half the regular rate during the period July 1, 1944 to December 31, 1944, during which period they were also regularly on duty 24 hours each alternate day (Findings 23(a), 24(a), and 25(a)).

During the aforesaid periods between December 1, 1942 and December 31, 1944, when overtime pay at time and one-half the regular rate was denied, the petitioners were classified by the War Department as employees whose hours of duty were intermittent or irregular. The petitioners earnestly believe that such classification was erroneous, and at variance with the plain meaning of the words, "intermittent or irregular", and the uncontested fact that the petitioners' hours of duty were 24 each alternate day, regularly and uninterruptedly, over long periods of time (Findings 18, 20, 22, 23, 24 and 25).

The petitioners' view is supported by the report of the Commissioner of the Court of Claims (filed June 13, 1946), reading in part as follows:

> "22. At no time during the periods covered by these claims were the hours of duty of either of the plaintiffs intermittent, irregular or less than full time. * * *" (Finding 22).

In view of the decisions of this Court in *Armour & Co.* v. *Wantock*, and *Skidmore* v. *Swift & Co., supra*, both decided December 4, 1944, dealing with overtime pay of firefighters, the Civil Service Commission on January 20, 1945, issued Departmental Circular No. 24, eliminating the option, which departments and agencies had under former regulations, of treating occupations whose regular tours of duty include stand-by or on-call time as falling either under the $300 or the 15 per centum pay increase formula of Section 3(a) of the War Overtime Pay Act, or under the overtime pay provisions of Section 2 of the Act, and including within the administrative workweek for overtime pay purposes all stand-by or on-call time in a regularly scheduled tour of duty except that allowed for sleep and meals (Finding 12).

On January 25, 1945, the War Department issued Civilian Personnel Circular No. 13, whereby effective January 1, 1945, firefighters working the 24-hour shift were to be considered working 16 hours within the spread of each 24 hours daily tour of duty, and were to be paid overtime compensation accordingly. The issuance of this circular was made necessary by the amendment which the Civil Service Commission made to its War Overtime Pay Regulations to accord with *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co., supra* (Finding 13).

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, were paid overtime compensation at time and one-half the regular rate for 16 hours of overtime per week for the period January 1, 1945 to June 30, 1945, but the War Department did not so compensate the petitioners for the periods prior to January 1, 1945 (Findings 23, 24 and 25).

The War Department used two classes of firefighters at the Gulfport Field, viz., "structural" firefighters with the principal duty of fighting fires in buildings, and "crash" firefighters with the principal duty of fighting fires in

planes. The petitioner, Albert F. Conn, was a "structural" firefighter for part of the period involved herein, and a "crash" firefighter for the balance of the time. The Gulfport Field was in active use for the training of combat crews in heavy bombardment and there was flying at the base, day and night. There were five fire stations at the base but two of these were closed down in 1943. The equipment at the "crash" station, known as Station No. 5, consisted of one large water truck, two small water trucks, one Cardox truck which carried carbon dioxide, and miscellaneous firefighting equipment (Findings 14, 15, 16 and 17).

During the periods for which the petitioners claim overtime compensation, their hours of duty were from 6:00 p. m. to 6:00 p. m. on each 24-hour tour of duty. They were required to sign a time sheet at the time of entering and at the time of leaving duty. They were required to remain on the alert and in readiness at all times, day or night, to respond to fire alarms sent to their station or perform other duties. The petitioners were not permitted to leave the base at any time during their 24-hour tour of duty and were required to remain at or within 50 feet of their station at all times, except when ordered elsewhere in the performance of their duies. They were not allowed to leave the fire station for meals and their food was prepared and served there by one of the firefighters. There were two meals served daily, breakfast and lunch. No recreational equipment was provided for their use and the firefighters were not allowed to engage in any games or other recreation during their tours of duty (Finding 18). There was only one shift of firefighters on duty each 24 hours; no relief crew was held in reserve (Finding 15). The hours from 10:00 p. m. to 6:00 a. m., each day, were designated as the rest period at petitioners' fire station, subject to the firefighters being called out at any time if a fire occurred or threatened

during that period, or for the performance of other duties (Finding 21).

The petitioners were required to be on duty the entire 24 hours, and performed substantial activities between the hours of 10:00 p. m. to 6:00 a. m. which were designated as the rest period. Once or twice each week the crew at Station No. 5 spent from 12 to 18 hours converting blocks of dry ice into liquid carbon dioxide for use in the Cardox truck and the chemical fire extinguishers, and this required the attention of the men engaged on such work during the entire night. They were also required to perform watch duty during the rest period, and there were times during such period when they were called out on drills. The firefighters at Station No. 5 made a substantial number of runs in response to fire alarms during the so-called rest period. The length of time they were away from the station on a firefighting assignment varied from 5 minutes to as much as 6 hours (Findings 19, 21 and 22). The petitioners' activities during the so-called rest period were substantial, whereas in *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co., supra,* the firefighters were only required to respond to alarms, which were rare.

It is an interesting fact in these cases that the petitioners, while members of the "crash" crew, had 8-hour tours of duty six days a week in the period between July 1, 1943 and June 30, 1944, and were paid overtime accordingly. When the War Department on July 1, 1944, changed petitioners' tours of duty back to the two-platoon system, consisting of 24 hours on duty followed by 24 hours off duty, there was no change in pay to compensate for the increase in the hours of duty (R. 20, Findings 16, 23, 24 and 25). It appears that the petitioners actually suffered a loss in pay when their hours of duty were increased from 48 per week to an average of 84 per week. Time and one-half for the additional 8 hours per week results in greater overtime pay

than the compensation in lieu of overtime pay of either $300.00 or 15 per centum of the basic annual compensation. By increasing the hours of duty from 48 to an average of 84 per week, a reduction in pay was effected, and the Government thereby also saved the cost of an entire crew, as two crews operated Station No. 5 instead of three formerly employed.

Questions Presented

1. Were the petitioners' hours of employment for the periods prior to January 1, 1945 either "intermittent" or "irregular" when it appears that they continuously worked under a regular scheduled tour, fixed by the War Department, of 24 consecutive hours of duty followed by 24 consecutive hours off duty? The petitioners' hours of employment were the same for the period January 1, 1945 to June 30, 1945, but for such subsequent period, they were not treated as intermittent or irregular employees and were paid overtime at time and one-half for 16 hours per week.

2. Are the petitioners entitled to overtime compensation at time and one-half the regular rate for all hours of duty in excess of 40 per administrative workweek for the periods in question when they were on duty 24 hours each alternate day, under the applicable Overtime Pay Acts?

3. In the alternative, are the hours from 10:00 p.m. to 6:00 a.m., designated for rest and meals, to be excluded in arriving at the overtime per workweek, for the periods in question?

4. In the further alternative, how many hours, if any, are to be excluded for rest and meals under the facts and circumstances of these cases in arriving at the overtime per workweek, for the periods in question?

5. When the petitioners were on duty 24 hours each alternate day, what were their hours of employment within the

meaning of the term "employment" as used in the applicable Overtime Pay Acts?[1]

6. Is the time during which the petitioners were on leave (sick or annual) with pay to be excluded or deducted for overtime pay purposes? The Court below answered this question in the negative.

7. Doesn't the petitioners' waiting time, stand-by time and on-call time during the 24 hours on duty, constitute "employment" time within the meaning of that term as used in the applicable Overtime Pay Acts, in the same manner as was held in *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co., supra*?

8. In calculating the petitioners' "regular rate of compensation," for overtime pay purposes, is (a) the annual basic compensation to be divided by 52 to ascertain the weekly rate, and the weekly rate divided by 40, the number of hours in a normal workweek, to ascertain the regular hourly rate, which is in harmony with *United States* v. *Townsley*, 323 U. S. 557, as the petitioners contend, or is (b) the annual rate to be divided by 360 to ascertain the daily rate, and the daily rate divided by 8 to ascertain the regular hourly rate, as the respondent contends?

Statutes Involved

The pertinent statutory provisions will be found in the Appendix attached hereto.

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[1] In Finding 16 of the Commissioner's report (filed June 13, 1946), it is stated in part as follows:

"• • • During the entire period covered by their claims, plaintiffs were each working under this system, and their hours of employment consisted of 24 hours on duty followed by 24 hours off duty, thus completing for each plaintiff a total of 168 hours of duty in each bi-weekly period or an average of 84 hours per week. • • •."

Specification of Errors to Be Urged

The Court below erred:

1. In holding that overtime compensation at one and one-half times the regular hourly rate was not payable to the petitioner, Albert F. Conn, for the periods from December 1, 1942 to June 30, 1943, and from July 1, 1944 to June 30, 1945, and to the petitioners, Robert D. Flynt and Willie E. Nelson, for the period from July 1, 1944 to June 30, 1945, under Senate Joint Resolution 170, Public Law No. 821 of December 22, 1942 (56 Stat. 1068), effective December 1, 1942, and the War Overtime Pay Act of 1943 (57 Stat. 75), effective May 1, 1943, for all hours of duty performed by them in excess of 40 hours per administrative workweek in such periods, and in failing to hold that such overtime compensation is payable. (Findings 23(c), 24(c) and 25(c)).

2. In the alternative, in holding that overtime compensation at one and one-half times the regular hourly rate was not payable to the petitioner, Albert F. Conn, for the periods from December 1, 1942 to June 30, 1943, and from July 1, 1944 to December 31, 1944, and to the petitioners, Robert D. Flynt and Willie E. Nelson, for the period from July 1, 1944 to December 31, 1944, under the terms of the said 1942 and 1943 Acts, on the same basis as that used by the War Department, *i.e.*, that they actually worked 16 hours within the spread of each 24-hour period of their tours of duty, after excluding 8 hours designated for rest and meals, without deduction for leave, etc., in computing their overtime pay from January 1, 1945 to June 30, 1945, and in failing to hold that such overtime compensation is payable. (Findings 23(e), 24(e) and 25(e)).

3. In the further alternative, in holding that overtime compensation at one and one-half times the regular hourly

rate was not payable to the petitioner, Albert F. Conn, for the periods from December 1, 1942 to June 30, 1943, and from July 1, 1944 to December 31, 1944, and to the petitioners, Robert D. Flynt and Willie E. Nelson, for the period from July 1, 1944 to December 31, 1944, under the terms of the said 1942 and 1943 Acts, on the basis that they actually worked 16 hours within the spread of each 24-hour period of their tours of duty, after excluding 8 hours designated for rest and meals, and deducting leave, etc., and in failing to hold that such overtime compensation is payable. (Findings 23(d), 24(d) and 25(d)).

4. In failing to hold that for the periods involved the entire 24 hours on duty each alternate day under the facts and circumstances of these cases constituted "employment" within the meaning of that term as used in the applicable Acts; in the alternative, in failing to hold that for the periods prior to January 1, 1945, 16 hours within the spread of each 24 hours on duty constituted "employment," excluding 8 hours designated for rest and meals, on the same basis as that used by the War Department commencing January 1, 1945; and in the further alternative, in failing to allow such overtime compensation as is right and proper under the applicable Acts.

5. In holding that for the periods prior to January 1, 1945, when the petitioners' hours of duty were 24 each alternate day, the petitioners were classifiable as employees whose hours of duty were intermittent or irregular, and in failing to classify them as entitled to overtime compensation at time and one-half the regular rate for such periods, in the same manner as they were classified after January 1, 1945.

6. In holding that in calculating the petitioners' "regular rate of compensation," for overtime pay purposes, the

annual basic compensation is to be divided by 360 to ascertain the daily rate, and the daily rate divided by 8 to ascertain the regular hourly rate, and in failing to hold that the annual basic compensation is to be divided by 52 to ascertain the weekly rate, and the weekly rate divided by 40 to ascertain the regular hourly rate.

7. In failing to hold that the petitioners' waiting time, stand-by time and/or on-call time constituted "employment," within the meaning of that term as used in the applicable Acts.

8. In entering judgments dismissing the petitions.

9. In overruling petitioners' motion for new trial.

Reasons for Granting the Writ

1. The decision of the Court of Claims is in direct conflict with the judicial pronouncements of this Honorable Court in *Armour & Co.* v. *Wantock*, 323 U. S. 125, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134, both decided December 4, 1944, dealing with overtime pay of firefighters under the Fair Labor Standards Act. In *Armour & Co.* v. *Wantock*, *supra*, Mr. Justice Jackson, who delivered the unanimous opinion of the Court, stated in part as follows: (p. 133)

> "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

> "That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In *Missouri, K. & T. R. Co.* v. *United States*, 231 US 112, 119, 58 L. Ed. 144, 147, 34 S. Ct. 26, the Court held that inactive time was to be counted in applying a federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. Referring to certain delays, this Court, said, 'In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait.' "

In both *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co., supra,* it was recognized that waiting time or stand-by time was to be counted as employment time. In each of these cases, a certain period was designated for rest, and the firefighters were only required to respond to alarms during such period on rare occasions. In the instant cases under consideration here, the petitioners were required to perform substantial duties during the so-called rest period.

After this Court announced its decisions in *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co., supra,* the Civil Service Commission revised its regulations eliminating the option which departments and agencies previously exercised of paying employees whose regular tours of duty included stand-by or on-call time $300.00 or 15% of their base pay under Section 3(a) of the War Overtime Pay Act, or overtime pay at time and one-half under Section 2 of the Act. The Commission recognized the impropriety of classifying employees with a regular tour of duty of 24 hours each alternate day as employees whose hours of duty

were intermittent or irregular. The change in the regulations was made to correct the previous erroneous classification, which inflicted a serious injustice. To quote the language of the Commission in support of the change, "This is in accord with two recent decisions of the Supreme Court of the United States dealing with a similar situation in industry under the Fair Labor Standards Act. *Armour and Co.* vs. *Wantock and Smith; Skidmore* vs. *Swift and Co.;* both decided December 4, 1944." (Finding 12).

The War Department, pursuant to the revised regulations of the Civil Service Commission, began effective January 1, 1945, paying for 16 hours of each 24 hours on duty. (Finding 13). The petitioners worked an average of 3½ shifts of 24 hours each per week, and 3½ times 16 hours was established as the compensable workweek of 56 hours.

In these cases, there was no long-continued, consistent administrative practice, by published regulations or orders, and repeated reenactments by Congress in the face of such practice. The departments and agencies have no authority to change the law by regulations or orders, and the Civil Service Commission cannot give departments or agencies options to do so. The intent of Congress in the enactment of the Overtime Pay Acts is not changeable by regulations or orders.

When the War Department established an average workweek of 84 hours in lieu of 48 hours, with no increase in pay to compensate for the extra hours, a serious injustice was imposed, and the petitioners earnestly feel that this was contrary to the policy of Congress in the enactment of the Overtime Pay Acts. Time and one-half for 8 of the 48 hours results in greater compensation than the amounts paid in lieu of overtime compensation when the hours of duty averaged 84 per workweek.

2. The decision of the Court of Claims is in direct conflict with *Rokey* v. *Day & Zimmerman*, (C.C.A. 8), 157 F. 2d 734, decided November 8, 1946; *Bowers* v. *Remington Rand*, (C.C.A. 7), 159 F. 2d 114, decided December 10, 1946, and *Bell* v. *Porter*, (C.C.A. 7), 159 F. 2d 117, decided December 10, 1946, in each of which cases the firefighters were paid for 16 hours of each 24 consecutive hours on duty. The Government in the cases under consideration here did not pay the petitioners for 16 hours of each 24 consecutive hours on duty for the period prior to January 1, 1945.

There is no substantial difference between the cases here and those decided under the Fair Labor Standards Act, except that here the petitioners were required to perform substantial duties during the so-called rest period, they were not permitted to indulge in recreational activities such as cards, games, etc., as the firefighters in the aforesaid decided cases had a right to do, and they were only permitted to rest during the so-called rest period when there was an opportunity to rest.

Under the Fair Labor Standards Act, an employer, who fails to pay overtime which is due, is liable for time and one-half, liquidated damages in an amount equal to such sum, and attorney's fee, and the Government enforces the policy of that Act. The Federal Overtime Pay Acts applying to Federal employees contain no such impositions against the Government, but nevertheless the Government should by its standards of observance of the law set a pattern of fair dealing for private citizens to follow. If the Government does not pay its firefighters time and one-half where they are on duty 24 consecutive hours each alternate day, why should private industry be forced to do so?

Mr. Edgar B. Young of the Bureau of the Budget in his testimony before the Sub-Committee of the House Civil Service Committee, in support of the overtime pay legisla-

tion for Federal employees, (February 24-25-26, 1943), stated in part as follows:

> "Mr. REES. From what you have suggested, you are attempting to comply with what is known as the Fair Labor Standards Act, is that correct? Is that what you mean?
>
> "Mr. YOUNG. We are accepting the Fair Labor Standards Act as the established policy of the nation with respect to basic workweek and to compensation for employment in excess of the 40-hour basic workweek."

The petitioners here who were required to spend 24 hours on duty at their post of duty, and devote their entire time to the service of the defendant, were in no sense intermittent or irregular employees. The Government does have employees with intermittent or irregular hours of duty, but that classification does not apply to the petitioners here.

3. The decision of the Court of Claims holding that in the calculation of the regular rate of pay the annual salary is to be divided by 360 to ascertain the daily rate, and the daily rate divided by 8 to ascertain the regular hourly rate, which is to be multiplied by one and one-half to arrive at the hourly overtime rate, is in conflict with the method of calculation used in *United States* v. *Townsley*, 323 U. S. 557.

4. In pay suits by Federal employees in the District Courts of the United States, the Department of Justice has urged that the Court of Claims has sole jurisdiction. If the Department of Justice is correct in this view, the questions here presented can only be settled by issuing the writ to the Court of Claims.

5. The Court of Claims has decided in these cases questions of substance and importance in the administration

of the Federal Overtime Pay Acts, which, with certain exceptions and limitations, apply generally to all Federal employees. The decision herein will affect a substantial group of civilian firefighters who worked for the War Department in various parts of the country under the two-platoon system, which system is still in use by the War Department.

This Honorable Court has heretofore recognized the importance of questions decided by the Court of Claims in suits for overtime pay by the issuance of the writ in *United States* v. *Meyers,* 320 U. S. 561, decided January 3, 1944, affecting a large group of Government customs inspectors, and *United States* v. *Townsley,* 323 U. S. 557, decided January 15, 1945, affecting Government employees of the Canal Zone.

The congressional policy to compensate civilian employees for hours of employment in excess of 40 hours in any administrative workweek is reflected by the language of the Act, and this policy may not be thwarted by the adoption of orders or regulations which are designed to give employees something less than the full benefit of the Act. The wisdom of the policy to pay overtime compensation is a matter strictly within the province of Congress. *Glass City Bank* v. *United States,* decided November 13, 1945, 90 L. Ed. 72; *Markham* v. *Cabell,* decided December 10, 1945, 90 L. Ed. 168; *United States* v. *American Union Transport,* decided February 25, 1946, 90 L. Ed. 507; *North American Co.* v. *Securities and E. Com.,* decided April 1, 1946, 90 L. Ed. 737. The petitioners earnestly believe that an injustice has been inflicted upon them, and that the same should be remedied by this Court. If the overtime hours amounted to 44 hours per week or 2,288 hours for the year of 52 weeks, the pay increase in the case of a firefighter having an annual salary of $1,620 would amount to about

119%, if the correct method of computing overtime compensation is to divide the annual salary by 360 to ascertain the daily rate and divide the daily rate by 8 to ascertain the regular hourly rate. Such an increase is in harmony with the Congressional purpose because the overtime hours are in excess of 100% of the normal workweek and Congress provided for time and one-half for the excess hours. The War Department's revised regulations following *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co., supra*, attribute 16 hours per week of overtime to the firefighters. If this is the correct rule to be applied to the period prior to January 1, 1945, the pay increase would amount to approximately 43%. Take as an illustration the case of a firefighter with an annual base salary of $1620. If the formula prescribed by the Court is used, his hourly wage appears to be 56¢; time and one-half on this basis would produce 84¢ per hour. If a firefighter worked a full year, he would accumulate about 832 hours of overtime per year if the overtime hours per week are considered to be 16, and at 84¢ an hour the additional compensation would amount to $698.88 in lieu of the $300 flat salary increase received by him prior to January 1, 1945. Since his basic salary was $1620 he would thus have received a pay increase of approximately 43% as contrasted with the 21⅔% which the Court says was the Congressional goal in the overtime pay statutes involved. If the firefighters' workweek is considered to be 56 hours, of which 16 hours were overtime, there is an actual increase in recognizable working hours of 40%. It is certainly not a shocking thing and could scarcely be said to have been foreign to the Congressional intent to give the statutes here involved a construction which would produce a pay increase of 43% based upon a new standard of measuring hours of employment

which increased such hours in the case of firefighters by 40%. Viewed from a slightly different angle it appears that the administrative workweek for government employees in general was increased during the war by Executive Order from 40 to 48 hours, or an increase in the workweek of 20%. To compensate for that, Congress increased pay for government workers an average of 21⅔%. It is felt, however, that since in the instant cases the period designated for rest was subject to repeated interruptions for manufacturing carbon dioxide, responding to fire alarms, stand-by service, drills, and other duties, and were not permitted to indulge in any recreational activities, the treatment of the entire 24 hours on duty as hours of employment would seem warranted.

The War Department still has in its employ civilian firefighters working under the two-platoon system of 24 consecutive hours on duty followed by 24 consecutive hours off duty. The Federal Employees Pay Act of 1945, approved June 30, 1945, 59 Stat. 295, which is not involved here because the periods in question are governed by the prior Acts, uses the language, "all hours of employment • • • in excess of forty hours in any administrative workweek • • •." That Act expressly provides for dividing the per annum rate by 2,080, comprising of 52 weeks of 40 hours each, to ascertain the basic hourly rate of compensation, whereas in the cases under consideration here, by dividing the annual salary by 360 to ascertain the daily rate and dividing the daily rate by 8, as urged by the Government, the per annum rate is in effect divided by 2,880, whereas there are only 2,080 hours in a normal work year, and if this view is correct, the petitioners, even if they recover, will not secure the benefit of true time and one-half. The petitioners should be accorded such justice as is permissible under the law, and in harmony with the same.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims should be granted.

Respectfully submitted,

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May 1947.

APPENDIX

The Pertinent Statutory Provisions

The Joint Resolution approved December 22, 1942, Public Law 821-77th Congress, Chapter 798-2d Session, S. J. Res. 170, 56 Stat. 1068, c. 798, applicable to the period December 1, 1942 to April 30, 1943, inclusive, provided as follows:

> The joint resolution entitled "Joint resolution extending the period for which overtime rates of compensation may be paid under certain Acts," approved July 3, 1942, is amended by striking out "November 30, 1942," and inserting "April 30, 1943": *Provided*, That the authorization contained herein to pay overtime compensation to certain groups of employees is hereby extended, effective December 1, 1942, to all civilian employees in or under the United States Government, including Government-owned or controlled organizations (except employees in the legislative and judicial branches), and to those employees of the District of Columbia municipal government who occupy positions subject to the Classification Act of 1923, as amended: *Provided further*, That such extension shall not apply to (a) those whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose, (b) elected officials, (c) heads of departments, independent establishments and agencies, and (d) employees outside the continental limits of the United States, including Alaska, who are paid in accordance with local prevailing native wage rates for the area in which employed: *Provided further*, That overtime compensation authorized herein and under the Act approved February 10, 1942 (Public Law Numbered 450, Seventy-seventh Congress), and section 4 of the Act approved May 2, 1941 (Public Law Numbered 46, Seventy-seventh Congress), as amended, shall be payable only on that part of an employee's basic compen-

sation not in excess of $2,900 per annum, and each such employee shall be paid only such overtime compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of $5,000 per annum: *And provided further*, That officers or employees whose compensation is based on mileage, postal receipts, fees, piecework, or other than a time period basis or whose hours of duty are intermittent, irregular, or less than full time, substitute employees whose compensation is based upon a rate per hour or per day, and employees in or under the legislative and judicial branches, shall be paid additional compensation, in lieu of the overtime compensation authorized herein, amounting to 10 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum, and each such employee shall be paid only such additional compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of $5,000 per annum.

* * * * * * *

Sec. 4. This joint resolution shall take effect as of December 1, 1942, and shall terminate on April 30, 1943 or such earlier date as the Congress by concurrent resolution may prescribe.

Senate Joint Resolution 170, set forth above, referred to certain acts approved July 3, 1942, and thereby incorporated therein by reference the Act approved June 28, 1940 (54 Stat. 676); the Act approved October 21, 1940 (54 Stat. 1205); and the Act approved June 3, 1941 (55 Stat. 241).

Joint Resolution approved October 2, 1942, Public Law 728-77th Congress, Chapter 577-2d Session, H. J. Res. 346, 56 Stat. 765, extending for two months the period for which overtime rates of compensation may be paid under the Acts of June 28, 1940 (54 Stat. 676), October 21, 1940 (54 Stat. 1205), and June 3, 1941 (55 Stat. 241), provided as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress as-

sembled, That the joint resolution entitled "Joint resolution extending the period for which overtime rates of compensation may be paid under certain Acts," approved July 3, 1942, is amended by striking out "September 30, 1942" and inserting "November 30, 1942."

Joint Resolution approved July 3, 1942, Public Law 652-77th Congress, Chapter 482-2d Session, H. J. Res. 329, 56 Stat. 645, extending the period for which overtime rates of compensation may be paid under certain Acts, provided as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions for the payment of overtime rates of compensation contained in the Act approved June 28, 1940 (54 Stat. 676); the Act approved October 21, 1940 (54 Stat. 1205); and the Act approved June 3, 1941 (55 Stat. 241), are hereby extended from June 30, 1942, to and including September 30, 1942.

The Act approved June 28, 1940, Public No. 671-76th Congress, Chapter 440-3d Session, H. R. 9822, 54 Stat. 676, to expedite national defense, and for other purposes, insofar as pertinent, provided as follows:

Sec. 5. (a) Notwithstanding the provisions of any other law, the regular working hours of the Navy Department and the Coast Guard and their field services shall be eight hours a day or forty hours per week during the period of the national emergency declared by the President on September 8, 1939, to exist: *Provided*, That under such regulations as the head of the Department concerned may prescribe, and where additional employees cannot be obtained to meet the exigencies of the situation, these hours may be exceeded: *Provided, further*, That compensation for employment in excess of forty hours in any administrative workweek computed at a rate not less than one and one-half times the regular rate shall be paid only to monthly, per diem, hourly, and piecework employees, whose wages are

set by the Act of July 16, 1862 (12 Stat. 587), as amended or modified; and also to professional and subprofessional employees and to blueprinters, photostat and rotaprint operators, inspectors, supervisory planners and estimators, and supervisory progressmen, and assistants to shop and plant superintendents of the CAF service, as defined by the Classification Act of March 4, 1923 (42 Stat. 1488, U. S. C. 5, ch. 13), as amended: *Provided further*, That in determining the overtime compensation of per annum Government employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of their respective per annum salaries: *Provided further*, That the President is authorized to suspend, in whole or in part, for the War and Navy Departments and for the Coast Guard and their field services, during the period of the National Emergency declared by him on September 8, 1939, to exist, the provisions of the Act of March 3, 1931 (46 Stat. 1482; U. S. C. 5, 26 (a)), if in his judgment such course is necessary in the interest of national defense, and any regulations issued pursuant to the Act of March 14, 1936 (49 Stat. 1161; U. S. C. Supp. V, title 5, Sec. 29 (a)), may be modified accordingly: *And provided further*, That notwithstanding the provisions of any other law, the President is hereby authorized, in his discretion, to prescribe regulations to establish such uniformity among the War and Navy Departments and the Coast Guard and their field services in regard to hours of work and compensation for overtime of their civilian employees as he may deem necessary in the interest of national defense.

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The Act Approved October 21, 1940, Public No. 873-76th Congress, Chapter 903-3rd Session, S. 4208, 54 Stat. 1205, establishing overtime rates for compensation for employees of the field services of the War Department, and the field services of the Panama Canal, and for other purposes, provided as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That notwithstanding the provisions of any other law, compensation for employment in excess of forty hours in any administrative workweek computed at a rate not less than one and one-half times the regular rate is hereby authorized to be paid at such places and to such monthly, per diem, hourly, and piecework employees of the field services of the War Department and the field services of the Panama Canal whose wages are set by wage boards or other wage fixing authorities, and also to professional and subprofessional employees, and to blueprinters, photostat and rotaprint operators, inspectors, storekeepers, toolkeepers, and shop superintendents of the CAF service, as defined by the Classification Act of March 4, 1923 (42 Stat. 1488; 5 U. S. C. ch. 13), as amended, as shall be designated from time to time by the Secretary of War or the Governor of the Panama Canal, as the case may be, and the Secretary of War and the Governor of the Panama Canal are authorized to prescribe for their respective services, regulations for overtime employment for said employees or any of them: *Provided,* That in determining the overtime compensation of the foregoing per annum Government employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of their respective per annum salaries.

The Act approved June 3, 1941, Public Law 100-77th Congress, Chapter 168-1st Session, S. 1541, 55 Stat. 241, authorizing overtime rates of compensation for certain per annum employees of the field services of the War Department, the Panama Canal, the Navy Department, and the Coast Guard, and providing additional pay for employees who forego their vacations, insofar as pertinent, provided in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That compensation for employment in excess of forty hours in any administrative workweek computed at a rate of one and one-half times the regu-

lar rate is hereby authorized to be paid, under such regulations as the President may prescribe, to those per annum employees in the field service of the War Department, the Panama Canal, the Navy Department, and the Coast Guard, whose overtime services are essential to and directly connected with the expeditious prosecution of the overtime work upon which the employees enumerated in section 5 (a) of the Act of June 28, 1940, and section 1 of the Act of October 21, 1940, are engaged: *Provided*, That in determining the overtime compensation of the foregoing per annum employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of the respective per annum salaries.

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Sec. 4. The provisions of this Act shall be effective during the national emergency declared by the President on September 8, 1939, to exist, and shall terminate June 30, 1942, unless the Congress shall otherwise provide.

The War Overtime Pay Act of 1943 (57 Stat. 75), approved May 7, 1943, applicable to the period May 1, 1943 to June 30, 1945, inclusive, insofar as pertinent, provided as follows:

This Act shall apply to all civilian officers and employees (including officers and employees whose wages are fixed on a monthly or yearly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose, except those in or under the Government Printing Office or the Tennessee Valley Authority) in or under the United States Government, including Government-owned or controlled corporations, and to those employees of the District of Columbia municipal government who occupy positions subject to the Classification Act of 1923, as amended, except that this Act shall not apply to (a) elected officials; (b) judges; (c) heads of departments, independent establishments, and agencies; (d) officers and

employees in the field service of the Post Office Department; (e) employees whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose; (f) employees outside the continental limits of the United States, including Alaska, who are paid in accordance with local prevailing native wage rates for the area in which employed; (g) officers and employees of the Inland Waterways Corporation; and (h) individuals to whom the provisions of section 1 (a) of the Act entitled "An Act to amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes," approved March 24, 1943 (Public Law Numbered 17, Seventy-eighth Congress), are applicable. As used in this section the term "elected officials" shall not include officers elected by the Senate or House of Representatives who are not members of either body.

Sec. 2. Officers and employees to whom this Act applies and who are not entitled to additional compensation under section 3 shall be paid overtime compensation computed on the same basis as the overtime compensation which was authorized to be paid under Public Law Number 821, Seventy-seventh Congress: *Provided,* That such overtime compensation shall be paid only on the portion of an officer's or employee's basic rate of compensation not in excess of $2,900 per annum: *Provided further,* That such overtime compensation shall be paid on such portion of an officer's or employee's basic rate of compensation notwithstanding the fact that such payments will cause his aggregate compensation to exceed a rate of $5,000 per annum. * * *

Sec. 3. (a) Except as provided in subsection (c), officers and employees to whom this Act applies and whose hours of duty are intermittent or irregular, officers and employees in or under the legislative and judicial branches (except those in the Library of Congress, or the Botanic Garden, and per annum employees

in or under the Office of the Architect of the Capitol who are regularly required to work not less than forty-eight hours per week) to whom this Act applies, and, subject to the approval of the Civil Service Commission, officers and employees whose hours of work are governed by those of private establishments which they serve and for whom on this account overtime work schedules are not feasible, shall be paid, in lieu of the overtime compensation authorized under section 2 of this Act, additional compensation at the rate of (1) $300 per annum if their earned basic compensation is at a rate of less than $2,000 per annum, or (2) 15 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum if their earned basic compensation is at a rate of $2,000 per annum or more.

(b) Any officer or employee to whom this Act applies and who is entitled to no additional compensation under subsection (a) or subsection (c) for a pay period, shall be paid for such pay period, in lieu of overtime compensation under section 2, additional compensation at the rate of $300 per annum, unless his overtime compensation under section 2 for such pay period is at least equal to such additional compensation.

(c) Any officer or employee to whom this Act applies and whose hours of duty are less than full time, or whose compensation is based upon other than a time period basis shall be paid, in lieu of overtime compensation or additional compensation under the foregoing provisions of this Act, additional compensation at a rate of 15 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum.

* * * * * * *

Sec. 9. The Civil Service Commission is authorized and directed to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration of the provisions of the foregoing sections of this Act insofar

as such provisions affect employees in or under the executive branch of the Government.

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Sec. 14. This Act shall take effect on May 1, 1943, and shall terminate on June 30, 1945, or such earlier date as the Congress by concurrent resolution may prescribe.

(821)

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 103

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE E. NELSON, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 48–61) is reported at 68 F. Supp. 966.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1946 (R. 61). A motion for new trial, filed by petitioners on January 30, 1947, was overruled on March 3, 1947 (R. 61). The petition for a writ of certiorari was filed on May 26, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the War Department and the Civil Service Commission exceeded the authority granted by federal overtime-pay statutes and executive orders in classifying firemen, civil service employees of the War Department who were working on a two-platoon work schedule, as intermittent or irregular workers to be paid, in addition to their basic pay, the statutory compensation "in lieu of overtime" authorized for such workers.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Joint Resolution of December 22, 1942, 56 Stat. 1068, the War Overtime Pay Act of May 7, 1943, 57 Stat. 75 (50 U. S. C. App., Supp. V, 1401), Executive Order 9289 of December 26, 1942 (7 Fed. Reg. 10897), and the regulations of the Civil Service Commission and the War Department promulgated pursuant thereto are set forth in the Appendix, *infra*, pp. 17–27.

STATEMENT

At all times material to this suit, petitioners were civil service employees of the United States, with salaries fixed on a per annum basis (R. 20). They were continuously employed, from the dates of their respective hirings[1] through June 30, 1945, as civilian fire fighters at the United States Army Air Base, Gulfport, Mississippi (R. 20). Except

[1] Petitioner Conn began work September 24, 1942; petitioner Nelson began work July 17, 1943; and petitioner Flynt began work February 17, 1944 (R. 20).

for the 12-month period ending June 30, 1944,[2] the tours of duty of all civilian fire fighters at the Gulfport Air Base, including petitioners, were based on the two-platoon system whereby the work-week was divided into two alternate shifts of 24 consecutive hours each (R. 38). During the same period,[3] petitioners received, in addition to their regular salaries, monthly compensation "in lieu of overtime" authorized for intermittent or irregular workers by applicable federal overtime pay statutes.

The present suit was instituted by them in the court below to recover additional overtime compensation. Primarily, petitioners contended that they were improperly classified as intermittent or irregular workers and should have been classified as employees whose entire shift, under the two-platoon system, was compensable working time. In addition, they sought to have their claimed additional overtime compensation calculated by a formula other than that authorized by the applicable federal overtime statutes. The facts may be summarized as follows:

During the periods for which they seek overtime compensation, *i. e.*, while working under the

[2] From July 1, 1943, to June 30, 1944, petitioners' tours of duty were fixed at 8 hours a day for six days a week and no claim is here involved for overtime pay during that period (R. 39).

[3] Petitioner Conn's claim covers the periods December 1, 1942, to June 30, 1943, and July 1, 1944, to June 30, 1945 (R. 44); the claims of petitioners Flynt and Nelson cover the period July 1, 1944, to June 30, 1945, (R. 45, 47).

two-platoon system, petitioners were attached to the "crash station," so designated because it was the primary duty of firemen stationed there to provide fire-fighting services necessary in connection with fires in aircraft and fires or hazards created by crash landings (R. 38).[4] Their hours of duty were 6 P. M. to 6 P. M. on each shift (R. 39). Their activities consisted of the regular routine duties performed around the fire station,[5] and their duties incident to aircraft fires (R. 39–42). The court below found that the hours during each tour of duty when petitioners were actually engaged in working were intermittent and irregular (R. 41); it concluded from all the evidence that petitioners were actually working a total of 77 hours in each bi-weekly period, or an average of $38\frac{1}{2}$ hours per week (R. 50–51).[6]

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[4] The fire fighters at the other stations on the Base were classified as "structural" fire fighters because their principal duties consisted of fighting fires in buildings (R. 38).

[5] In addition to their fire fighting activities petitioners duties consisted of keeping their station and the surrounding grounds clean, cleaning and polishing equipment, checking and maintenance of equipment, repairing fire extinguishers, and routine inspection tours. A regular course of instruction, in which the fire fighters spent one or two hours each day, was offered. In addition two members of the crew of the "crash station" were on watch duty at all times. The "watch" duty was alternated by the firemen. (R. 40.)

[6] It was found that the time required in the performance of petitioners' duties, aside from fire fighting, varied from day to day and from week to week according to the conditions at the Base, but averaged approximately eight hours per day (R. 40). During the remaining periods of their tours of duty petitioners were required to remain on the Base in the vicinity

From December 1, 1942, to June 30, 1943, and from July 1, 1944, to December 31, 1944,[7] the War Department classified petitioners, for overtime pay purposes, as employees whose hours of duty (time devoted to actual work) were intermittent and irregular (R. 20). They were duly paid their basic annual compensation plus additional sums as monthly compensation in lieu of overtime compensation (R. 43–47). Their classification as intermittent or irregular employees and the determination of their rates of pay were made pursuant to the Joint Resolution of December 22, 1942, Appendix, *infra*, pp. 17–18, the War Overtime Pay Act of May 7, 1943, Appendix, *infra*, pp. 21–22, and the Executive Order and departmental regulations promulgated in accordance therewith (R. 20). Subsequent to December 31, 1944, petitioners were classified for overtime pay purposes under amended regulations as having an administrative work week of 56 hours (R. 20). Petitioners' hourly rates of pay, for the purpose

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of their station, and to hold themselves in readiness to respond to alarms (R. 39). A period of one hour per day was allowed for eating the two meals which were served at the station (R. 39–40), and the hours from 10 p. m. to 6 a. m. each day were designated as rest periods during which petitioners were free to sleep in the facilities provided, subject to their being called out to fight fires or perform other necessary work (R. 40–41). It was the general rule that when the sleep of the firemen was interrupted for fire fighting work, they were allowed to sleep later the following morning, or some of their routine duties would be cancelled for that day (R. 41).

[7] See note 2, *supra*, p. 3.

of computing overtime compensation, was determined in accordance with the formula set forth in the Joint Resolution of December 22, 1942, and the War Overtime Pay Act, Appendix, *infra*, pp. 17–18, 21–22, by which the annual rate of pay is divided by 360 to determine the daily rate and the resulting figure is then divided by 8 to determine the hourly rate of pay (R. 48).[8]

[8] Petitioners were paid the following sums for the indicated work periods (R. 43–47):

Period	Basic annual compensation	Monthly compensation in lieu of overtime and monthly* overtime compensation	Hours of duty in excess of 40 hours per week
Conn:			
Dec. 1, 1942 to Dec. 31, 1942	$1,500.00	$12.50	137
Jan. 1, 1943 to Jan. 30, 1943	1,680.00	14.00	1,076
July 1, 1944 to Dec. 31, 1944	2,040.00	25.50	901½
Jan. 1, 1945 to June 30, 1945	2,100.00	*75.82	964
Flynt:			
July 1, 1944 to Oct. 15 1944	1,680.00	25.00	514
Oct. 16, 1944 to Dec. 31, 1944	1,860.00	25.00	351
Jan. 1, 1945 to June 30, 1945	1,860.00	*67.16	1,069
Nelson:			
July 1, 1944 to Dec. 31, 1944	1,860.00	25.00	770
Jan. 1, 1945 to June 30, 1945	1,860.00	*67.16	960

From Dec. 1, 1942, to June 30, 1943, Conn was paid additional compensation in lieu of overtime equal to 10 percent of his monthly compensation; from July 1, 1944, to Dec. 31, 1944, he was paid additional compensation in lieu of overtime equal to 15 percent of his monthly compensation; from Jan. 1, 1945, to June 30, 1945, he was paid overtime compensation at the rate of one and one-half times his hourly rate for an average of 16 hours overtime per week (R. 43). From July 1, 1944, to December 31, 1944, Flynt and Nelson were paid additional compensation in lieu of overtime equal to $300 per year; from Jan. 1, 1945, to June 30, 1945, they were paid overtime compensation at the rate of one and one-half times their hourly rate for an average of 16 hours of overtime per week (R. 45–47).

Section 1 of the Joint Resolution December 22, 1942,[9] Appendix, *infra,* pp. 17–18, provided that employees whose hours of duty were intermittent or irregular or less than full time should be paid additional compensation, in lieu of overtime compensation, a sum equal to 10 percent of their earned basic compensation not in excess of $2,900. Section 7 of Executive Order No. 9289 of December 26, 1942, 7 Fed. Reg. 10897, Appendix, *infra,* pp. 18–19, directed, in part, that employees "whose work (as determined by the head of the department or agency concerned) requires them to remain at or within the confines of their posts of duty for more than 40 hours per week but does not require that all of their time be devoted to actual work * * * be considered to have intermittent or irregular hours of duty within the meaning of section 1 of * * * Senate Joint Resolution 170 * * *" (R. 23). War Department Orders U, December 26, 1942, Appendix, *infra,* pp. 19–21, specifically included fire fighters in the class of employees considered to have intermittent or irregular hours of duty (R. 23–25). Similar provisions were contained in Section 3 of the War Overtime Pay Act, Appendix, *infra,* pp. 21–22, and the War Overtime Pay Regulations of the Civil Service Commission of May 8, 1943, 8 Fed. Reg. 6149, Appendix,

[9] Prior to this resolution the existing pay statutes did not grant the right of overtime pay to civilian employees such as petitioners (R. 48–49).

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infra, pp. 22–24, which were issued pursuant to that Act (R. 25–29).[10] Fire fighters were again specifically included in the class of employees considered to be intermittent or irregular employees for purposes of overtime compensation by War Department Civilian Personnel Regulation No. 80 of December 15, 1943, Appendix, *infra*, pp. 24–25, which superseded Orders U, *supra*, p. 7 (R. 29–34). On January 4, 1945, the Civil Service Commission amended its War Overtime Pay Regulations and provided that the administrative work week for those employees rendering "stand-by service" at or within the confines of their stations included the total number of duty hours per week less time allowed for sleep and meals. 10 Fed. Reg. 772. Appendix, *infra*, pp. 25–26 (R. 34–35). War Department Civilian Personnel Circular No. 13 of January 25, 1945, Appendix, *infra*, pp. 26–27, contained a similar provision (R. 35–37).

As stated above, petitioners instituted the instant actions in the Court of Claims on the theory

[10] Section 3 (a) of the Act provided that employees whose hours of work were intermittent or irregular be paid in lieu of overtime $300 per annum if their earned basic compensation was at a rate of less than $2,000 per annum, or 15 per cent. of their earned basic compensation not in excess of $2,900, if their earned basic compensation was at a rate of $2,000 per annum or more (R. 26–27). Section 20.7 of the War Overtime Pay Regulations defined intermittent or irregular employees as employees whose work required them to remain at their posts of duty for more than 40 hours per week but did not require that all of their time be devoted to actual work (R. 28).

that the entire time covered by their shifts under the two-platoon system, which averaged 84 hours per week, were hours of employment within the intent and meaning of the Joint Resolution of December 22, 1942, and the War Overtime Pay Act (R. 1–18, 52–53). The Court of Claims rejected this theory, held that petitioners were not entitled to recover overtime compensation in excess of the amounts which had been allowed and paid them for the periods involved (R. 52), and accordingly dismissed the petition (R. 61).

ARGUMENT

Petitioners seek to recover overtime compensation for an asserted work week of 84 hours. They argue that to allow this claim is merely to carry out the intention of Congress, which, they contend, has been thwarted by the adoption of departmental orders and regulations. In support of their claim petitioners assert that the opinion of the court below is in conflict with *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Skidmore* v. *Swift & Co.,* 323 U. S. 134; *Rokey* v. *Day & Zimmerman,* No. 994, Oct. T. 1946, certiorari denied, March 31, 1947; *Bell* v. *Porter,* No. 993, Oct. T. 1946, certiorari denied, April 7, 1947; and *Bowers* v. *Remington Rand, Inc.,* No. 995, Oct. T. 1946, certiorari denied, March 31, 1947 (Pet. 12–15); and that the method used in the calculation of the sums which they were paid in lieu of overtime conflicts with the method used in *United States*

v. *Townsley*, 323 U. S. 557. We submit that petitioners' claims lack substance, and that, contrary to petitioners' suggestion (Pet. 16–17), the case was correctly determined by the court below. Moreover, the petition presents no question requiring decision by this Court.

1. As the court below pointed out, petitioners' contention, that the entire time covered by their regular tours of duty were hours of employment within the intent and meaning of the Joint Resolution of December 22, 1942, and the War Overtime Act, is based on a false premise (R. 52–53).[11] While those Acts provided overtime compensation for certain classes of employees "for employment in excess of forty hours," they also specifically provided that employees whose hours of employment were considered to be intermittent or irregular were to be paid a bonus as additional compensation in lieu of overtime compensation (R. 53–

[11] Earlier Acts which provided for the payment of overtime compensation to certain employees of the Navy Department, the Coast Guard, the War Department, and the Panama Canal (Act of June 28, 1940, 54 Stat. 678; Act of October 21, 1940, 54 Stat. 1205) stated that "employment in excess of forty hours in any administrative workweek" was to be computed "at a rate not less than one and one-half times the regular rate" (R. 21). Petitioners contend that this proviso was, by reference, carried into the Joint Resolution of December 22, 1942, and the War Overtime Pay Act and therefore covered the entire time included in their regular tours of duty (R. 53).

55). The Executive Order and departmental regulations which were promulgated pursuant to these Acts (see *supra,* pp. 5–8), and which classified petitioners as intermittent or irregular employees, merely restated this explicit Congressional intention.

Petitioners contend that it was the intention of Congress to provide for the payment of overtime compensation. It does not follow, however, that Congress intended to direct the computation of overtime compensation based on the total hours of duty for employees such as fire fighters, lighthouse keepers and forest rangers, the nature of whose employment required them to remain at their posts of duty for extended periods of time, but did not require that their entire duty periods be devoted to actual work. Quite to the contrary, Congress specifically recognized that the nature of the work of certain classes of employees did not readily lend itself to an overtime pay program. Thus, Senate Report 1847, 77th Cong., 2d sess., which accompanied S. J. Res. 170 (which became the Joint Resolution of December 22, 1942), stated that employees, whose hours of duty were intermittent or irregular and thus could not readily be included in an overtime pay program, were to be paid additional compensation in lieu of overtime

in an amount equal to 10 per cent. of their basic salary not in excess of $2,900.[12] By contemporaneous executive constructions of the Act, petitioners were considered to be included in this latter group of employees (see *supra*, pp. 5–8). Great weight is to be given this construction of the statute, which will not be overturned unless clearly wrong. See *United States* v. *Jackson*, 280 U. S. 183, 193.

It is clear that had Congress felt that this construction of the Joint Resolution of December 22, 1942, was inaccurate, it had an early opportunity to correct it since the Joint Resolution expired by its own terms on April 30, 1943.[13] Yet identical coverage was written into Section 3 (a) of the War Overtime Pay Act of 1943 for intermittent and irregular workers, together with a formalized power in the Civil Service Commission to issue necessary regulations (Section 9).

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[12] This report read in pertinent part (at p. 2): "Provision is made for the payment of additional compensation to certain employees, the nature of whose work does not readily lend itself to an overtime pay program. Such additional compensation would amount to 10 percent of so much of an employee's salary as does not exceed a rate of $2,900 per annum * * *. Included in this category would be employees * * * whose hours of duty are intermittent, irregular, or less than full time * * *."

[13] S. Rep. 1847, *op cit.*, described S. J. Res. 170 as a temporary expedient, and stated that the date of April 30, 1943 had been selected in order to permit the Civil Service Committee to continue its study of the problems involved with a view to making additional recommendations early in the new Congress. *Ibid.*, p. 2.

The legislative history of the 1943 statute is devoid of any suggestion that Congress disagreed with the prior administrative construction of the Joint Resolution of which Congress had been apprised [14] in classifying petitioners' group as intermittent or irregular workers. It thus may be assumed that the reenactment without material change of a provision of a statute constituted legislative approval of the prior administrative construction. See *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 99.

Arguing that there "* * * is no substantial difference between the cases here and those decided under the Fair Labor Standards

[14] Congressional knowledge of the administrative interpretation of the Joint Resolution of December 22, 1942, is evidenced by Executive Order No. 9289, Appendix, *infra*, pp. 18–19; War Department Orders U of December 26, 1942, Appendix, *infra*, pp. 19–21; and the following explanation by Mr. Edgar B. Young of the Bureau of the Budget to Senator Mead during the hearings on S. 635 (78th Cong. 1st Sess.) which was later enacted as the War Overtime Pay Act of 1943:

"Mr. YOUNG. As I understand it, the Senator was pointing his question solely to those groups, the nature of whose work was such that they could not work overtime, and it had no reference to the overtime group.

* * * * *

"Again, I point out that the large group of bonus payments occur in the Postal Service, and there are only a scattered number who would receive it among the balance of the Federal employees, and the largest single group who would receive any benefit or payment under that clause would be in the War Department, where the fire fighters, guards, and so forth, are covered." (Hearings before a Sub-Committee of the Committee on Civil Service, United States Senate, 78th Congress, 1st Session, on S. 635, pp. 35–36.)

Act * * *" (Pet. 15), petitioners rest heavily on this Court's decisions in *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (Pet. 12–14). The *Wantock* and *Skidmore* cases held that the waiting time of privately employed firemen was compensable time within the meaning of the Fair Labor Standards Act. But the dispositive issue here is not one of compensation but of classification of government employees. Petitioners have received the proper compensation "in lieu of overtime" which, as stated above, Congress specifically provided for federal employees the nature of whose work did not lend itself to a conventional overtime pay program.[15] Nor is there anything in the *Wantock* or *Skidmore* decisions, nor in the other Fair Labor Standards Act cases

[15] There is no merit to petitioners' contention that the court below should have employed the formula for determining hourly rates of pay approved in *United States* v. *Townsley*, 323 U. S. 557. Since petitioners were classified as intermittent or irregular workers, there was no question of computing hourly rates of pay. The formula for computing compensation "in lieu of overtime" was prescribed for such workers by the war overtime pay statutes. See footnote 8, *supra*, p. 6. Moreover, for Federal employees entitled to overtime compensation for work in excess of 40 hours per week, the war overtime pay statutes specifically provided that in "determining the overtime compensation of per annum Government employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of the respective per annum salaries" (R. 59). The Act of March 28, 1934, 48 Stat. 522, involved in the *Townsley* case, contained no such statutory formula.

referred to by petitioners, which limits or invalidates the classifications of federal employees made administratively under the 1942 and 1943 federal overtime statutes here involved. Concededly, governmental employment policy sought to conform, insofar as feasible, to the national policy established for private industry by the Fair Labor Standards Act. Pursuant to this policy, the Civil Service Commission changed petitioners' classification on January 4, 1945, the change stated to be "* * * in accord with two recent decisions * * * dealing with a similar situation in industry under the Fair Labor Standards Act * * *", citing the *Wantock* and *Skidmore* cases (R. 34–35). But this change in classification cannot bear the weight which petitioners seek to place upon it. It was not compelled nor was it made to "* * * correct the previous erroneous classification * * *", as petitioners contend (Pet. 14). It constituted merely an exercise of the power of classification under the 1942 and 1943 statutes. The change was not retroactive and did not invalidate the prior classification of petitioners as "intermittent or irregular workers". The court below correctly recognized the administrative power to classify specific groups of employees by "necessary and proper regulations" and refused to set aside the regulations here involved as "clearly beyond the authority conferred * * *" (R. 57).

CONCLUSION

The decision of the Court of Claims is clearly correct, there is no conflict, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1947.

APPENDIX

The Joint Resolution of December 22, 1942 (56 Stat. 1068) provides in part as follows:

> The joint resolution entitled "Joint resolution extending the period for which overtime rates of compensation may be paid under certain Acts", approved July 3, 1942, is amended by striking out "November 30, 1942," and inserting "April 30, 1943": *Provided,* That the authorization contained herein to pay overtime compensation to certain groups of employees is hereby extended, effective December 1, 1942, to all civilian employees in or under the United States Government, including Government-owned or controlled organizations (except employees in the legislative and judicial branches), and to those employees of the District of Columbia municipal government who occupy positions subject to the Classification Act of 1923, as amended: *Provided further,* That such extension shall not apply to (a) those whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose, (b) elected officials, (c) heads of departments, independent establishments and agencies, and (d) employees outside the continental limits of the United States, including Alaska, who are paid in accordance with local prevailing native wage rates for the area in which employed: *Provided further,* That overtime compensation authorized herein and under the Act approved February 10, 1942 (Public Law Numbered 450, Seventy-seventh Congress),

and section 4 of the Act approved May 2, 1941 (Public Law Numbered 46, Seventy-seventh Congress), as amended, shall be payable only on that part of an employee's basic compensation not in excess of $2,900 per annum, and each such employee shall be paid only such overtime compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of $5,000 per annum: *And provided further*, That officers or employees whose compensation is based on mileage, postal receipts, fees, piecework, or other than a time period basis or whose hours of duty are intermittent, irregular, or less than full time, substitute employees whose compensation is based upon a rate per hour or per day, and employees in or under the legislative and judicial branches, shall be paid additional compensation, in lieu of the overtime compensation authorized herein, amounting to 10 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum, and each such employee shall be paid only such additional compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of $5,000 per annum.

* * * * *

SEC. 4. This joint resolution shall take effect as of December 1, 1942, and shall terminate on April 30, 1943, or such earlier date as the Congress by concurrent resolution may prescribe.

Executive Order No. 9289 (7 F. R. 10897) provided in part:

Section 2. Overtime compensation for employment in excess of 40 hours during an officially established regular work-

week, and for work ordered or approved in addition to the regular workweek so established shall be paid at the rate of one and one-half times the employee's regular rate of compensation, subject to the following limitations:

(a) No overtime compensation shall be paid on any part of an employee's basic rate of compensation in excess of $2,900 per annum;

* * * * *

For the purpose of computing overtime compensation the pay for one hour shall be considered to be 1/8 of the employee's pay for one day and the pay for one day shall be considered to be 1/260 of the employee's per-annum salary.

Section 7. Employees such as certain forest-fire lookouts, forest guards, and lighthouse keepers the nature of whose work (as determined by the head of the department or agency concerned) requires them to remain at or within the confines of their posts of duty for more than 40 hours per week but does not require that all of their time be devoted to actual work shall be considered to have intermittent or irregular hours of duty within the meaning of the last proviso of section 1 of the said Senate Joint Resolution 170, 77th Congress.

War Department Orders U, December 26, 1942, provide in part:

4. * * *

c. Method of computing.

(1) Overtime compensation of employees paid on an annual basis, for employment in excess of 40 hours during the regular 48-hour weekly tour of duty, will be calculated on an annual basis and paid in equal amounts at the regular pay periods. The

annual rate of overtime pay is obtained by multiplying the overtime day rate by 52, the number of regular overtime days during the year. Thus an employee paid a basic salary of $1,800 per annum will be paid, when in a pay status, for a full semimonthly pay period, the regular salary of $75 plus $16.25, or $91.25, less appropriate deductions. The overtime compensation is in addition to the regular rate of pay and is computed at the rate of time and one-half of the regular rate of pay, the regular daily rate being $\frac{1}{360}$ of the basic annual rate.

(2) Overtime compensation for approved work beyond the 48-hour weekly tour of duty will be computed by the hour—the hourly overtime rate being $\frac{1}{360}$ of the basic annual rate, divided by eight, multiplied by $1\frac{1}{2}$—and will be paid in addition to the basic salary and overtime for the regular weekly tour of duty.

* * * * *

9. Employees whose compensation is based on mileage, fees, piece-work, or other than a time period basis or whose hours of duty are intermittent, irregular, or less than full time (in this instance, a "less than full time" employee is one employed on a part-time basis for less than 42 hours per week in the departmental service, and less than 40 hours in the field service), and who are not subject to section 23, Act of March 28, 1934 (48 Stat. 522); the Act of July 2, 1940 (Public Law 703, 76th Congress); or Executive Order No. 8848, will be paid additional compensation at the rate of 10 percent provided the salary paid does not exceed a rate of $2,900 per annum, excluding the 10 percent. Employees paid salaries

exceeding a rate of $2,900 per annum but not over $5,000, will be paid the 10 percent additional compensation on a rate of $2,900 per annum, but the aggregate of salary and additional compensation paid at any one time will not exceed a rate of $5,000 per annum. The ceiling rates listed in paragraph 4*b* (2), and the provisions of paragraph 4*f*, will apply.

a. Employees such as firefighters who because of the nature of their work are required to remain at or within the confines of their posts of duty for more than 40 hours per week, but who are not required to devote all their time to actual work, will be considered to have intermittent or irregular hours of duty and are subject to the provisions of this paragraph.

The War Overtime Pay Act of 1943, 57 Stat. 75 (50 U. S. C. App., Supp. V, 1401) provides in part:

* * * * *

SEC. 3. (a) Except as provided in subsection (c), officers and employees to whom this Act applies and whose hours of duty are intermittent or irregular, officers and employees in or under the legislative and judicial branches (except those in the Library of Congress, or the Botanic Garden, and per annum employees in or under the Office of the Architect of the Capitol who are regularly required to work not less than forty-eight hours per week) to whom this Act applies, and, subject to the approval of the Civil Service Commission, officers and employees whose hours of work are governed by those of private establishments which they serve and for whom on this account overtime work schedules are not feasible, shall be paid, in lieu of the overtime compensation authorized under

section 2 of this Act, additional compensation at the rate of (1) $300 per annum if their earned basic compensation is at a rate of less than $2,000 per annum, or (2) 15 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum if their earned basic compensation is at a rate of $2,000 per annum or more.

* * * * *

SEC. 9. The Civil Service Commission is authorized and directed to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration of the provisions of the foregoing sections of this Act insofar as such provisions affect employees in or under the executive branch of the Government.

* * * * *

The War Overtime Pay Regulations of the Civil Service Commission of May 8, 1943 (8 F. R. 6149) provide in part:

* * * * *

20.4 FULL-TIME EMPLOYEES. Full-time employees are employees who are regularly required to work, as a minimum, the number of hours in the administrative workweek specified for employees in their respective groups.

20.7 INTERMITTENT OR IRREGULAR EMPLOYEES. Intermittent or irregular employees who are not regularly required to work a specified minimum number of hours. Employees whose work requires them to remain at, or within, the confines of their posts of duty for more than forty hours per week, but does not require that all of their time be devoted to actual

work, may be considered to be intermittent or irregular employees, or in the discretion of the head of the department or agency concerned, may be considered to be full-time employees having such administrative workweek as is specified by such head.

* * * * *

20.12 COMPUTATION OF OVERTIME COMPENSATION. Overtime compensation shall be paid at a rate of one and one-half times the employee's regular rate of compensation computed as provided in this section: *Provided, however,* That when the overtime compensation for any pay period is less than a rate of $300 per annum, in lieu of such overtime compensation, there shall be paid the employee an additional amount equal to either (a) a rate of $300 per annum or (b) 25% of the employee's earned basic compensation for the pay period, whichever is less, but this proviso shall not be construed to reduce the overtime compensation to which the employee is entitled by virtue of actual overtime employment. In determining whether an employee shall be eligible for additional compensation in lieu of overtime compensation, leave without pay during any pay period shall not be construed as reducing the rate of overtime compensation.

The computation of overtime compensation shall be subject to the following conditions.

(a) HOURLY RATES AND DAILY RATES. For employees paid at an annual rate, the daily rate shall be considered to be $\frac{1}{360}$ of the annual rate, and the hourly rate shall be considered to be $\frac{1}{8}$ of the daily rate.

(b) MAXIMUM BASE FOR COMPUTATION. Overtime compensation shall be paid only upon such portion of the basic rate of com-

pensation of an officer or employee as does not exceed $2,900 per annum.

* * * * *

20.14 INTERMITTENT, IRREGULAR, AND OTHER EMPLOYEES. Intermittent and irregular employees and, subject to the approval of the Civil Service Commission, employees whose hours of work are governed by those of private establishments which they serve and for whom, on this account, overtime work schedules are not feasible, shall be paid, in lieu of overtime compensation, additional compensation at a rate of (a) $300 per annum if their earned basic compensation is at a rate of less than $2,000 per annum or (b) 15 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 if their earned basic compensation is at a rate of $2,000 per annum or more, subject to the limitation in § 20.17 of this chapter.

War Department Civilian Personnel Regulation No. 80 of December 15, 1943 provides in part:

* * * * *

3–1. (3) *Full time employees.*—Those employees who are regularly required to work an established weekly tour of duty of 48 hours, and, with the approval of the commanding general of the appropriate force or his designated representative, those classes of employees at any installation who regularly work a minimum number of hours set by proper authority at more or less than 48 hours, but not less than 40, per week.

* * * * *

(7) *"On call" employees.*—Employees whose work requires them to remain at, or

within the confines of, their posts of duty more than 40 hours per week, but does not require that all of their time be devoted to actual work (for example, fire-fighters on duty 24 hours and off duty 24 hours).

* * * * *

3–7. *a* (2) Other intermittent and irregular employees, "on call" employees, "when actually employed" employees (including experts and consultants appointed under the provisions of the Military Appropriations Act of 1944 at a per diem rate on a "when actually employed" basis (23 Comp. Gen. 17)), and employees serving private establishments for whom overtime work schedules are not feasible shall be paid, in lieu of overtime compensation, additional compensation at a rate of 25 percent of earned basic compensation, if such compensation is at a rate of less than $1,200 per annum; $300 per annum, if earned basic compensation is at a rate of $1,200 per annum or more but less than $2,000 per annum; 15 percent of so much of earned basic compensation as is not in excess of the rate of $2,900 per annum, if earned basic compensation equals or exceeds the rate of $2,000 per annum.

b. Intermittent or irregular employees who are paid additional compensation at a rate of $300 per annum shall be paid $\frac{1}{360}$ of $300 for each day in a pay status.

The amended War Overtime Pay Regulations of the Civil Service Commission of January 4, 1945 (10 F. R. 772) provide in part:

20.3 Administrative work-week for full-time employees. (a) The administrative work-week for each group of full-time employees shall be the minimum number of

hours of work per week specified by the general public regulations issued by the head of a department or independent establishment pursuant to section 2 of the Act of March 14, 1936, 49 Stat. 1161, 5 U. S. C. 29a, and in accordance with applicable circulars of the Bureau of the Budget.

(b) In the case of employees whose work includes periods during which they are required to remain on duty and render "stand-by service" at or within the confines of their stations, the administrative workweek, for the purposes of the regulations in this part shall be the total number of regularly scheduled hours of duty per week (or in rotating-shift systems, the average number of regularly scheduled hours of duty per week for the cycle), including all such "standby" or "on call" time except that allowed by regulation of the department or independent establishment for sleep and meals. Effective January 1, 1945.

War Department Civilian Personnel Circular No. 13 of January 25, 1945, provides in part:

2. On-call employees are those employees who are required to remain at or within the confines of a designated post of duty for more than 40 hours a week for the purpose of rendering stand-by service, but who are not required to spend all of their tour of duty in the actual performance of work. A notable example of on-call employees are fire fighters who are on duty 24 hours and off duty 24 hours, or whose tour is a variation of this form of the two-platoon system. * * *

3. Not later than 1 April 1945 the tours of duty for all on-call employees will be fixed upon one of the following bases:

a. Twenty-four hours on duty followed by 24 hours off duty, thus completing a total of 168 hours of duty in a biweekly period.

* * * * *

4. The employees referred to in paragraph 3*a* * * * will be considered as working 16 hours within the spread of each 24 hours daily tour of duty. The other 8 hours of the tour will be considered as the amount of time spent in stand-by service during which the employee is free to eat or sleep. No action will be taken to set aside a specific portion or portions of the tour for this purpose and there is no change in the present requirement that employees be present for duty or in a leave-with-pay status during the full tour in order to be eligible for full compensation. Rather, the employee will be considered as being on duty the total time, but the fact that a portion of the tour is not active duty will be recognized in computing overtime compensation. This arrangement results, in effect, in the establishment of an average workweek of 56 hours for the employees referred to in paragraph 3*a* and of 48 hours for the employees referred to in paragraph 3*b*. Regular prorated overtime compensation will be computed on the basis of the average workweek so established.

U. S. GOVERNMENT PRINTING OFFICE: 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 103.

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE E. NELSON,
Petitioners,

v.

THE UNITED STATES.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CITATIONS.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled causes.

Opinion Below.

The opinion of the Court of Claims (R. 19-61) is reported in 107 C. Cls. 422 and also in 68 F. Supp. 966.

Jurisdiction.

The judgment of the Court of Claims was entered on December 2, 1946 (R. 61). Motion for new trial was overruled on March 3, 1947 (R. 61) and the petition herein for the writ was filed in less than three months after said date. This petition for rehearing is filed in due time. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement.

The petitioners who were civilian employees of the War Department seek to recover overtime compensation at one and one-half times the regular rate because of overtime employment. The petitioners were Civil Service employees in the War Department with salaries fixed on an annual basis and during the periods of the claims for overtime compensation held positions as civilian firefighters at the U. S. Army Air Base at Gulfport, Mississippi.

During the periods of the claims the petitioners worked under a regular scheduled tour of duty, as fixed by the War Department, which consisted of 24 hours on duty (6 p.m. to 6 p.m. the following day) followed by 24 hours off duty, averaging 84 hours of duty per administrative workweek. They were on actual duty during the entire 24 hours each alternate day.

The petitioner, Albert F. Conn, claims overtime compensation under Senate Joint Resolution No. 170, approved December 22, 1942 (Public Law No. 821, 56 Stat. 1068) for overtime employment during the period December 1, 1942 to May 1, 1943, and under the War Overtime Pay Act of 1943 (57 Stat. 75) for overtime employment during the period from May 1, 1943 to June 30, 1943, inclusive, and from July 1, 1944 to June 30, 1945, inclusive. The petitioners Robert D. Flynt and Willie E. Nelson each claim overtime compensation under the War Overtime Pay Act of 1943 for overtime employment during the period from July 1, 1944 to and including June 30, 1945.

Prior to January 1, 1945 the War Department erroneously classified the petitioners as employees whose hours of duty were intermittent or irregular, paying only 10 per cent of the base pay in lieu of overtime compensation under Senate Joint Resolution No. 170, and $300.00 per annum or 15 per cent of base pay, whichever was higher, in lieu of overtime compensation under the War Overtime Pay Act of 1943, but commencing January 1, 1945 the War Department corrected its erroneous classification, paying overtime compensation at one and one-half times the regular rate for 16 hours of overtime per administrative workweek.

If the petitioners are entitled to overtime compensation for the periods of their claims prior to January 1, 1945 on the same basis as that used by the War Department for the period from January 1, 1945 to June 30, 1945, i.e., 16 hours employment time during each 24 hours, excluding 8 hours designated for rest and meals, without deduction for leave, etc., the net amounts due the petitioners after deducting the amounts paid in lieu of overtime compensation are as follows: Albert F. Conn $590.82 (Finding 23 (e), R. 44); Robert D. Flynt $236.00 (Finding 24 (e), R. 46); and Willie E. Nelson $262.40 (Finding 25 (e), R. 47).

If the petitioners are entitled to overtime compensation for all hours of duty in excess of 40 hours per administrative workweek, the net amounts due are shown in the Findings (Findings 23 (c), 24 (c), and 25 (c)).

The questions presented, statutes involved, and specification of errors to be urged are set forth in the original petition which is made a part hereof by reference.

Reasons for Granting the Writ.

1. This case involves Federal questions of substance and importance in the administration of the Federal Overtime Pay Acts having general application to Government employees, and there are special and important reasons for the settlement of such questions by a decision of this Court.

In the Government's brief filed with the Court of Claims in the instant cases, it is stated in part as follows:

> The questions presented here are of widespread importance, there now being thirty-four cases involving similar claims pending in this court, and approximately 30,000 employees of the War Department alone who are potential claimants.

Additional cases have been filed with the Court of Claims, and there are presently pending before the District Courts of the United States at Philadelphia, Pa., St. Louis, Mo., Memphis, Tenn., and Norfolk, Va., a substantial number of similar cases.

The Government is urging before the District Courts that such Courts do not have jurisdiction in suits by civilian firefighters of the Government for overtime compensation because the statute denies to the District Courts jurisdiction of cases brought to recover fees, salary, or compensation by officers of the United States. (Jud. Code Sec. 24(20), 28 U. S. C. A. Sec. 41(20); Act July 2, 1942, 56 Stat. 611, 619; Act July 1, 1943, 57 Stat. 347, 356.)

In *Claud W. Owens* v. *U. S.*, Civil Action No. 354-M, involving a claim of a civilian firefighter of the Government for overtime compensation before the District Court of the United States for the Middle District of Alabama, the Government's motion to dismiss the complaint for lack of jurisdiction was granted. District Judge Kennamer, who delivered the opinion of the Court, stated in part as follows:

> The plaintiff invokes the jurisdiction of this court under section 41, subdivision 20, of the United States Code Annotated.
>
> The defendant, United States of America, by the United States Attorney for this district, filed its motion to dismiss the said cause out of this court for lack of jurisdiction, averring that suit is for fees, salary, or for compensation for official services of officers of the United States, as is prohibited in subdivision 20 of said section.

> Oral argument on the motion to dismiss was heard by the court, and certain documentary evidence exhibited to the court, from which the court finds that this plaintiff and others were employed by authority of the Secretary of War, after being found to possess proper qualifications as the result of a Civil Service examination as fire fighters, a position authorized by the Secretary of War. The plaintiff was appointed at a stated annual salary and subscribed to the usual oath of office.
>
> It appears to this court that this case, as made out by plaintiff's complaint and the evidence before the court, comes clearly within the decision of the United States Circuit Court of Appeals, 5th Circuit, in the case of Kennedy v. United States, 146 Federal (2nd), page 26.
>
> It is, therefore, ordered, adjudged and decreed that the motion to dismiss the said complaint is granted, and said complaint is dismissed, and the plaintiff is taxed with the cost in this suit, for which execution may issue.

In *Kennedy* v. *U. S.* (C. C. A. 5), 146 F. 2d 26, affirming 54 F. Supp. 446, it was held that a junior instructor of shop mathematics of the Air Corps at Large was an "officer of the United States", and therefore could not maintain a suit in the District Court for compensation.

There are presently pending before the Court of Claims about 66 cases from Alabama involving overtime pay of civilian firefighters.

If the Government's view that the District Courts do not have jurisdiction of suits by civilian firefighters of the Government for overtime compensation is correct, a conflict of decision by the Circuit Courts of Appeal of the United States is not possible.

In *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, Mr. Justice Stone, who delivered the opinion of the Court, stated in part as follows:

> Petition for certiorari raising the question, among others, whether the Court of Appeals had erred in hold-

ing patentable a combination including one element not described in the original application for the Gulick patent and later added to it by amendment, and not described at all in the Maynard patent, was at first denied, there being no conflict of decision. 303 Ct. 609. We later granted certiorari in 304 U. S. 587, 82 L. ed. 1548, 58 S. ct. 1052, 1053, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit. Cf. Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464, 79 L. ed. 997, 55 S. Ct. 449; Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U. S. 477, 79 L. ed. 1005, 55 S. Ct. 455.

The above mentioned decision is referred to in the order of this Court dated October 13, 1947, amending Rule 33, REHEARING.

In view of the jurisdictional situation which exists and the widespread importance of the questions presented affecting civilian firefighters of the Government in various parts of the country, it is respectfully submitted that the entire controversy should be settled by an affirmative decision of this Court. This Court has granted certiorari to the Court of Claims in other overtime pay cases involving Government employees. *U. S.* v. *Meyers*, 320 U. S. 561; *U. S.* v. *Townsley*, 323 U. S. 557.

2. The opinion of the Court of Claims in denying overtime compensation at one and one-half times the regular rate for the periods prior to January 1, 1945 is in direct conflict with the opinion of this Court in *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134, both decided December 4, 1944, which recognized the propriety of overtime compensation for overtime employment of firefighters under the Fair Labor Standards Act. That Act provided for overtime compensation at a rate not less than one and one-half times the regular rate for employment in excess of the hours specified therein.

The Acts applicable to the instant cases provide for overtime compensation at a rate of one and one-half times the regular rate for employment in excess of forty hours in any administrative workweek.

After this Court announced its decision in *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co.*, supra, the Civil Service Commission adopted amendments to include within the admnistrative work-week, for overtime pay or compensatory time-off purposes, all stand-by or on-call time in a regular scheduled tour of duty, except that allowed by departmental or agency regulation for sleep and meals. It was therein explained that:

> This is in accord with two recent decisions of the Supreme Court of the United States dealing with a similar situation in industry under the Fair Labor Standards Act. *Armour and Co.* v. *Wantock and Smith; Skidmore* v. *Swift and Co.;* both decided December 4, 1944. (R. 35)

The War Department, effective January 1, 1945, conformably with the amendments made by the Civil Service Commission, established an average workweek of 56 hours for firefighters who were on duty 24 hours and off 24 duty hours, and paid time and one-half the regular rate for 16 hours per administrative workweek. The scheduled tour of duty for the firefighters for the periods prior to January 1, 1945 was in all respects the same as the tour of duty after that date.

At no time during the periods covered by the claims involved herein were the hours of duty of either of the petitioners intermittent, irregular or less than full time. The classification of the petitioners as intermittent or irregular employees in the period prior to January 1, 1945 was in conflict with the law, and this was corrected effective January 1, 1945 to accord with the law. When the petitioners were on duty 48 hours per week, they received time and one-half for the extra 8 hours, and when their hours of duty were increased to an average of 84 hours per week,

they received no increase in pay because of such increased hours in the period prior to January 1, 1945. This was unfair and unjust and contrary to the intent of the Federal Overtime Pay Acts. The amounts paid in lieu of overtime compensation in the periods prior to January 1, 1945 were actually less than time and one-half for the extra 8 hours. The policy of Congress to pay overtime compensation for overtime employment cannot be thwarted by orders or regulations which are inconsistent with the intent of the law, and give employees something less than that contemplated by the applicable Acts. The petitioners were improperly classified prior to January 1, 1945 as employees whose hours of duty are intermittent or irregular. This was simply an erroneous conclusion when it is considered that the petitioners' hours of duty were regularly, uniformly and consistently 24 hours on duty each alternate day during the periods in question. The working conditions of the firefighters here were in no sense comparable with those of forest-fire lookouts, forest guards, and lighthouse keepers, who were classified as intermittent or irregular employees.

3. The opinion of the Court of Claims in denying overtime compensation at one and one-half times the regular rate for the periods prior to January 1, 1945 is in direct conflict with *Rokey* v. *Day & Zimmerman* (C. C. A. 8), 157 F. 2d 734, decided November 8, 1946; *Bowers* v. *Remington Rand* (C. C. A.), 159 F. 2d 114, decided December 10, 1946, and *Bell* v. *Porter* (C. C. A.), 159 F. 2d 117, decided December 10, 1946, in each of which cases the firefighters were paid for 16 hours of each 24 consecutive hours on duty, excluding 8 hours designated for rest and meals. The Government in the cases under consideration here did not pay the petitioners for 16 hours of each 24 consecutive hours on duty for the period prior to January 1, 1945.

The petitioners here only received approximately the following hourly rates for the hours of duty in excess of 40 per administrative workweek:

Period	Hours of duty in excess of 40 hours	Credit for Amount Paid	Hourly Rate of Overtime Compensation
Petitioner Albert F. Cona			
Dec. 1, 1942 to Dec. 31, 1942	137	$ 12.50	$ .09
Jan. 1, 1943 to June 30, 1943	1,076	84.00	.08
July 1, 1944 to Dec. 31, 1944	901½	153.00	.17
Jan. 1, 1945 to June 30, 1945	964	454.92	.47
Petitioner Robert D. Flynt			
July 1, 1944 to October 15, 1944	514	87.50	.17
Oct. 16, 1944 to Dec. 31, 1944	351	62.50	.18
Jan. 1, 1945 to June 30, 1945	1,069	402.96	.38
Petitioner Willie E. Nelson			
July 1, 1944 to Dec. 31, 1944	770	150.00	.19
Jan. 1, 1945 to June 30, 1945	960	402.96	.42

There is no substantial difference between the cases here and those decided under the Fair Labor Standards Act, except that here the petitioners were required to perform substantial duties during the so-called rest period, they were not permitted to indulge in recreational activities such as cards, games, etc., as the firefighters in the aforesaid decided cases had a right to do, and they were only permitted to rest during the so-called rest period when there was an opportunity to rest.

Conclusion.

In view of the above, it is respectfully submitted that the questions presented should be settled by a per curiam decision of this Court, or after oral argument, and to this end it is prayed that the writ be granted.

Respectfully submitted,

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Of Counsel.

November, 1947.

Certificate of Counsel.

I, Frederick Schwertner, attorney for petitioners, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FREDERICK SCHWERTNER.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 103

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE E. NELSON,
Petitioners,

v.

THE UNITED STATES.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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Now comes the undersigned, a member of the bar of this Court, and, with the consent of the petitioners and the respondent, submits the following brief as amicus curiae and on behalf of the International Association of Firefighters, a labor union affiliated with the American Federation of Labor, whose membership includes a considerable number of persons affected by this Court's decision.

These cases present a situation where the judicial arm of the government is unwittingly about to perpetuate an injustice, heretofore recognized and partially corrected by the executive branch, by attributing to the Congress an in-

tent which, by no reasonable stretch of the imagination, it could have had. The question involved concerns a large number of very small claims of forgotten men to whose protection this Court has been accustomed to devote its special interest. It is earnestly submitted, in the light of the following brief discussion, that the question at bar is a substantial one and of sufficient public importance to warrant its consideration by this Court.

By the relevant statutes,[1] it has been provided that overtime compensation at the rate of time and one-half shall be paid all government employees for "*employment* in excess of 40 hours in any administrative workweek" except that, among others, employees "whose hours of *duty* are intermittent or irregular" shall be paid, in lieu of overtime, a $300 lump sum per annum if their basic compensation is less than $2,000 or a flat 15% increase if $2,000 or more.

Petitioners, whose claims are typical of a large number of others similarly situated, were firefighters employed by the War Department. The hours of "duty", prescribed by the War Department as their regular administrative workweek, consisted of 24 hours every other day. Thus, each regularly remained on duty for 168 hours during each two weeks' period or an average of 84 hours per week.

In the beginning, the War Department apparently was perplexed in determining the number of hours of "employment" to be attributed to these firefighters for the purpose of computing overtime in excess of 40 hours per week. It solved this difficulty temporarily by arbitrarily deciding, under the pretended authority of certain Civil Service Commission regulations, that firefighters were employees whose "hours of duty" were "intermittent or irregular" and therefore entitled to only a flat $300 increase instead of time and one-half for overtime.

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[1] Senate Joint Resolution 170 approved December 22, 1942 (P. L. No. 821, 56 Stat. 1068); War Overtime Pay Act of 1943 (57 Stat. 75).

When this court, in the *Armour* and *Swift* cases [2] clarified the situation concerning "stand-by" duty performed by firefighters, the War Department amended its regulations, effective January 1, 1945, to conform to this Court's decision in those cases.[3] As a result, these petitioners and all others similarly situated were declassified as employees having "intermittent or irregular" hours of duty, were reclassified as regular employees and their hours of "employment", in the light of their peculiar duties and this Court's decisions in the *Armour* and *Swift* cases, determined to be 56 hours per week. Since that time petitioners have been paid on an overtime basis but no adjustment was ever made for the prior period, these suits being to recover the amounts due for such period.

No complaint is made against the War Department's administrative determination that the hours of "employment" were 56 per week. But is is preposterous to say that petitioners' hours of "duty" were either "intermittent" or "irregular". There was absolutely nothing intermittent or irregular about them. They were uniform, consistent and regular, were duly prescribed by War Department "administrative workweek" orders and differed from those of the great mass of other regular employees only in that their tours of continuous duty were much longer. The only thing irregular or intermittent about petitioners' duties was the number of hours of *actual* work performed in fighting fires during their stand-by periods of duty.

It may be conceded that the War Department had administrative discretion to determine the number of hours of compensable employment in cases of this sort. But neither the Civil Service Commission nor the War Department had any discretion to determine that consistent and regular duty

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[2] *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134.

[3] The Civil Service Commission, in effect, directed it to do so.

was "intermittent" or "irregular" duty, when, in fact, it was not. The Department's original regulations amounted simply to an unauthorized amendment of the statute.

The Civil Service Commission and the War Department ultimately recognized the correctness of the foregoing statement and the amendment of January 1945 resulted. The Court of Claims, however, while conceding the authority of the War Department to promulgate the amended regulations, held that the original regulations were also valid and, indeed, necessary to effectuate the congressional intent. In reaching these curious and irreconcilable conclusions, the Court of Claims relied chiefly on the following two grounds, neither of which is tenable.

(a) The Court feared that the adoption of petitioners' contention might conceivably result in pay increases of from 165 to 480 percent as contrasted with an alleged congressional intent to increase generally the pay of Federal employees approximately 21⅔ percent to compensate for a 20 percent increase in the Federal work week, i.e., from 40 to 48 hours. It is sufficient to say, in this connection, that the amended War Department regulations—which are here accepted to be valid ones—have produced no such grotesque results. On the contrary, they have merely brought the overtime compensation of firefighters into line with that of other regular employees.

(b) The original War Department regulations here challenged were promulgated on December 26, 1942, pursuant to the terms of J. R. 170. "It must be assumed", said the Court of Claims, "that Congress was aware of these contemporaneous interpretations when it enacted the Overtime Pay Act of May 7, 1943, which contained, in Section 3, almost exactly the same language which had been enacted in the last proviso of Joint Resolution 170."

In other words, the Court of Claims has assumed that Congress was aware of and ratified on May 7, 1943, the War Department regulations which had been in effect only

slightly more than four months. Such an assumption, it is believed, carries far beyond its ultimate limits the doctrine of legislative ratification which this Court has viewed with some considerable misgivings on two occasions within the past eighteen months.

In *Girouard* v. *United States*, 328 U. S. 61, 66 S. Ct. 826, 830, Mr. Justice Douglas remarked:

> "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error."

In his concurring opinion in *Cleveland* v. *United States*, 329 U. S. 14, 67 S. Ct. 13, 91 L. ed. 1, Mr. Justice Rutledge said:

> "Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments. See Girouard v. United States, 328 U. S. 61."

CONCLUSION.

As pointed out in the petition for rehearing, if this Court declines to pass upon the foregoing situations, a very large number of claimants will be prevented from securing any consideration of their claims.

In the light of the foregoing, it is submitted that the order denying the petition for a writ of certiorari should be set aside and certiorari granted.

Respectfully submitted,

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